13

Office - Supreme Court, U.S.
DEC 12 1952
HAROLD B. WILLEY, Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 429

LIONSHEAD LAKE, INC.,

Appellant,

vs.

TOWNSHIP OF WAYNE, A MUNICIPAL CORPORATION OF THE COUNTY OF PASSAIC AND STATE OF NEW JERSEY

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

JAMES J. LANGAN,
Counsel for Appellee.

EMORY, LANGAN AND LAMB,
FRED G. STICKEL, III,
Of Counsel.

INDEX

Subject Index

	Page
Statement in opposition to appellant's statement of jurisdiction and motion to dismiss or affirm	1
Statement of issues on appeal	1
No substantial federal question is presented by the attempted appeal	4

Table of Cases Cited

American Veteran's Housing Cooperative, Incorporated v. *Zoning Board of Adjustment*, 69 D. and C. 449 (Pa.), 66 Montgomery 7	5
Dundee Realty Co. v. *Omaha*, 144 Neb. 448, 13 N. W. 2d 634	5
Euclid v. *Ambler Realty Co.*, 272 U.S. 365, 71 Law ed. 303, 47 S. Ct. 114	4
Flora Realty and Investment Company v. *City of Ladue*, 344 U.S. 802	5
Flower Hill Building Corp. v. *Village of Flower Hill*, 199 Misc. 344, 100 N. Y. Supp. 2d 903	5
Fox Film Corp. v. *Muller*, 296 U.S. 207, 80 Law. ed. 158, 56 S. Ct. 183	3
Hadachek v. *Sebastian, et al.*, 239 U.S. 394, 60 Law. ed. 348, 36 S. Ct. 143	4
Lionshead Lake, Inc. v. *Township of Wayne, etc.*, 10 N. J. 165	2
Portland Railway, etc. Co. v. *Oregon Railroad Commission*, 229 U.S. 397, 51 Law ed. 1248, 33 S. Ct. 820	4
Senefsky v. *City of Huntington Woods*, 307 Mich. 728, 149 A.L.R. 1433	5
Thompson v. *City of Carrolton*, 211 S. W. 2d 790	5
Zahn v. *Board of Public Works*, 274 U.S. 325, 71 Law ed. 1074, 47 S. Ct. 594	4

Statutes and Other Authorities Cited

Constitution of the United States, Fourteenth Amendment	2
Zoning Ordinance of the Township of Wayne, State of New Jersey	2

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 429

LIONSHEAD LAKE, INC., A NEW JERSEY CORPORATION,
Appellant,

vs.

TOWNSHIP OF WAYNE, A MUNICIPAL CORPORATION OF THE COUNTY OF PASSAIC AND STATE OF NEW JERSEY,
Appellee

STATEMENT IN OPPOSITION TO APPELLANT'S STATEMENT OF JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

The Appellee in the above entitled cause for its statement in opposition to Appellant's statement as to jurisdiction herein, and in support of Appellee's motion to dismiss or affirm herein made pursuant to Rule 12 (3) of this Court, respectfully shows the following:

I

Statement of Issues on Appeal

The question sought to be presented in this appeal is Appellant's claim that a portion of the Zoning Ordinance of the Township of Wayne providing for a minimum dwelling floor space in private residences is violative of Ap-

pellant's rights under the Fourteenth Amendment to the Constitution of the United States. This claim the Appellee denies. The New Jersey Supreme Court in the opinion and judgment here challenged, did not in its opinion pass upon the general question now raised on this appeal by Appellant as to whether Zoning Ordinances which provide for a minimum dwelling space violate the Federal Constitution.

The New Jersey Supreme Court merely held that the provisions in the Ordinance requiring a specified minimum dwelling floor space were permitted by the New Jersey Constitution and the enabling State statute.

In the majority opinion of the New Jersey Supreme Court written by Vanderbilt, C. J. (10 N. J. 165 at 171) he said:

> "When the enabling zoning statutes, R. S. 40:55-30 and 31, both as amended by Chapter 305 of the Laws of 1948, *supra*, and R. S. 40:55-32, are read in the light of the constitutional mandate to construe them liberally, there can be no doubt that a municipality has the power by a suitable zoning ordinance to impose minimum living-floor space requirements for dwellings."

An examination of the Appellant's brief in the Supreme Court discloses that at no place did Appellant's counsel argue that the right to fix a minimum dwelling floor space is prohibited by the Federal Constitution. His entire argument in the State Supreme Court was that this particular minimum is unreasonable and arbitrary. Certainly it cannot be expected that this Court is going to examine the various Zoning Ordinances of all of the municipalities of the country to determine whether a certain minimum is reasonable. The argument of Appellant in the State Supreme Court was under four headings, and are as follows:

> "I—The test of the constitutionality of the instant zoning ordinance is whether it is reasonable and fair in its application and whether it bears a substantial relation to the public health, safety and morals; and

these questions of reasonableness and relationship are questions of fact.

II—There is an abundance of evidence in the record to support the Court's dispositive holding (which holding is one of fact) in the instant case.

III—Plaintiff's action was not premature.

IV—The judgment appealed from is complete in all respects and no further judgment is necessary."

It is clear that the general proposition that minimum dwelling floor space requirements in Zoning Ordinances violate the Federal Constitution, was not argued in the New Jersey Supreme Court by Appellant, and on well settled principles is not to be considered now by this Court.

The only respect in which the constitutionality of the Zoning Ordinance below was attacked in the State Court by Appellant, was on the ground that this particular Zoning Ordinance was unreasonable and arbitrary as applied to this particular Township. The record will disclose that this Appellee offered demonstrative proof that the fixing of a minimum dwelling floor space had a relation to health and that it stabilized property values. The proof with respect to the health feature was given by Dr. Winslow, an outstanding authority on public health, and the proof with respect to the stabilization of land values was given by Mr. Scott Bagby, a well known expert on municipal planning. Certainly it cannot be expected that this Court should take this case merely for the purpose of reiterating such well settled principles as that the preservation of health and the stabilization of land values by a municipality are within the police power.

It is apparent from the foregoing that the State Supreme Court disposed of Appellant's attack on the Ordinance upon adequate non-federal grounds, and accordingly, this appeal should be dismissed or the judgment of the State Court affirmed (*Fox Film Corp.* v. *Muller*, 296 U. S. 207, 80 Law Ed. 158, 56 S. Ct. 183).

II

No Substantial Federal Question Is Presented by the Attempted Appeal

Since the attack on the Ordinance below was on the ground that this particular Ordinance was unreasonable and arbitrary as applied to this particular municipality, we submit it cannot be said that there is any substantial federal question presented for decision by this Court. Certainly it cannot be expected that this Court is to act as an administrative agency in considering the reasonableness of the Zoning Ordinances of all of the municipalities of this country. Furthermore, there is clearly no merit to the contention that the Ordinance is arbitrary and unreasonable. That contention is answered fully and conclusively by the opinion of Vanderbilt, C. J. in the New Jersey Supreme Court. The power of States and Cities to place restraints and restrictions on the use of property by zoning laws in furtherance of the general welfare of the community has long ago been so definitely determined that no substantial question is presented by this appeal entitling appellant to invoke the jurisdiction of the Supreme Court of the United States. See *Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, 71 Law Ed. 303, 47 S. Ct. 114; *Zahn* v. *Board of Public Works*, 274 U.S. 325, 71 Law Ed. 1074, 47 S. Ct. 594, and *Hadacheck* v. *Sebastian, et al.*, 239 U. S. 394, 60 Law Ed. 348, 36 S. Ct. 143.

This Court in *Portland Ry., etc. Co.*, v. *Oregon R. R. Commission*, 229 U. S. 397, 51 Law Ed. 1248, 33 S. Ct. 820, said:

> "In this case the facts found by the lower court and adopted in the (State) Supreme Court are supported by competent testimony; and this Court does not sit to retry issues of fact thus heard and determined by

the properly constituted tribunals of the State having jurisdiction of the subject."

As a matter of fact, in five other jurisdictions approval has been given by the Courts to the general proposition that Zoning Ordinances with minimum dwelling space requirements are sustainable.

See:

Thompson v. *City of Carrolton*, 211 S. W. 2d 790 (Tex. Civ. App. 1948);

Flower Hill Building Corp. v. *Village of Flower Hill* (Sup. Ct. 1950); 199 Misc. 344, 100 N.Y. Supp. 2d 903;

Dundee Realty Co. v. *Omaha*, 144 Neb. 448, 13 N. W. 2d 634;

American Veteran's Housing Cooperative Inc. v. *Zoning Board of Adjustment*, 69 D. & C. 449 (Pa.) 66 Montgomery 7;

Senefsky v. *City of Huntington Woods*, 307 Mich. 728, 149 A.L.R. 1433 (Mich. Sup. Ct. (In Banc) 1493).

In the *Senefsky* case *supra*, the Court held that the ordinance there under review was unreasonable and arbitrary for the particular municipality involved. However, the Court at page 1436, as reported in 149 A.L.R., said:

> "It is not necessary for decision herein and we do not hold that under proper circumstances a municipality may not exercise its delegated police power in the manner herein attempted by defendants. Instead the extent of our holding herein is that under the circumstances of the instant case the enforcement against the plaintiff of the provision in the amended ordinance fixing the minimum amount of floor area is unreasonable."

This case is very similar to the case of *Flora Realty and Investment Company* v. *City of Ladue*, No. 228, October

Term 1952, in which this Court granted Appellee's motion to dismiss.

Wherefore, Appellee respectfully moves that the appeal herein be dismissed, or that the judgment of the Supreme Court of the State of New Jersey be affirmed.

JAMES J. LANGAN,
Counsel for Appellee.

EMORY, LANGAN & LAMB,
FRED G. STICKEL, III,
Of Counsel.

(5430)

INDEX

Subject Index

Page

Brief of Appellant in Opposition to Motion of Appellee to Dismiss or Affirm 1

Appellee's statement opposing jurisdiction confirms the jurisdiction of this court 1

The federal question presented is substantial 3

The opinion of the Supreme Court itself raises grave doubt as to the correctness of the judgment 4

In reviewing state court determinations of Federal questions this Court is not debarred from reviewing questions of fact 6

The cases cited by appellee do not sustain constitutionality of minimum dwelling space ordinances 7

Conclusion 8

TABLE OF CASES CITED

Aetna Life Insurance Co. v. *Haworth*, 300 U.S. 227, 240 (1937) 3

Baker v. *Somerville*, 138 Neb. 466, 293 N.W. 326 (1940) 7

California v. *San Pablo & T.R. Co.*, 149 U.S. 308, 313, 314 (1893) 3

Drivers Union v. *Meadowmoor Co.*, 312 U.S. 287, 293 (1941) 6

Dundee Realty Co. v. *Omaha*, 144 Neb. 448, 13 N.W. 2d 634 (1944) 7

Euclid v. *Ambler Co.*, 272 U.S. 365 (1926) .....5 & 6

Flora Realty and Investment Company v. *City of Ladue*, No. 228 O.T. 1952 7

Flower Hill Building Corp. v. *Village of Flower Hill*, (Sup. Ct. 1950) 199 Misc. 344, 100 N.Y. Supp. 2d 903.. 7

Page

Kansas City Southern Ry. Co. v. *C.H. Albers Commission Co.*, 223 U.S. 573, 591 (1912) 6
Lawrence v. *State Tax Comm.*, 286 U.S. 276, 282 (1932) 3
Live Oak Water Users Assn. v. *Railroad Commission of California*, 269 U.S. 354, 354-358 (1926) 2
Portland Ry. etc. Co. v. *Oregon R.R. Commission*, 229 U.S. 397 (1913) 6
Senefsky v. *City of Huntington Woods*, 370 Mich. 728, 12 N.W. 2d 387 (1943) 7
Thompson v. *City of Carrollton*, 211 S.W. 2d 970 (Tex. Civ. App., 1948) 7

STATUTES AND OTHER AUTHORITIES

Revised Zoning Ordinance for Wayne Township, New Jersey, dated July 12, 1949 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 429

LIONSHEAD LAKE, INC., a New Jersey Corporation,
Appellant,

v.

TOWNSHIP OF WAYNE, a Municipal Corporation of the County of Passaic and State of New Jersey.

BRIEF OF APPELLANT IN OPPOSITION TO MOTION OF APPELLEE TO DISMISS OR AFFIRM

This brief of the appellant opposing the motion of appellee to dismiss or affirm is filed pursuant to the provisions of Rule 7, ¶ 3.

1. APPELLEE'S STATEMENT OPPOSING JURISDICTION CONFIRMS THE JURISDICTION OF THIS COURT

The omissions in the Statement Opposing Jurisdiction and Motion to Dismiss or Affirm are more important and significant than the contentions made therein.

The appellee does not deny that the question of the validity of the Wayne Township ordinance under the Federal

Constitution was presented to the Supreme Court of New Jersey. Indeed, it could hardly do so in view of its Petition for Certification to the Supreme Court of the State quoted at page 7 of the Statement of Jurisdiction.

The appellee further concedes in his Statement Opposing Jurisdiction and Motion to Dismiss or Affirm:

> "The only respect in which the constitutionality of the Zoning Ordinance below was attacked in the State Court by Appellant, was on the ground that this particular Zoning Ordinance was unreasonable and arbitrary as applied to this particular Township." (p. 3)

Appellee's Statement Opposing Jurisdiction further concedes that the constitutionality of the ordinance in question was attacked in the Supreme Court of New Jersey on the grounds (A) that it is unreasonable and unfair in its application, and (B) that it is not within the police power because it bears no substantial relation to public health, safety or morals by quoting *in toto* the questions posed in appellant's brief below.[1] The same issues and contentions were urged by appellant below and although the court did not specifically mention the Federal Constitution these questions affecting the constitutional validity of the ordinance were recognized and discussed by the Supreme Court of New Jersey in its opinion (Statement of Jurisdiction, Appendix B, pp. 24, 31-32).

Under its first point, "Statement of Issues on Appeal," the appellee opposes jurisdiction on two apparent grounds:

> a. "The general proposition that minimum dwelling floor space requirements in Zoning Ordinances violate the Federal Constitution, was not argued in the New Jersey Supreme Court." (p. 2)

---

[1] We recognize, of course, that briefs below are not part of the record before this court *Live Oak Water Users Assn.* v. *Railroad Commission of California*, 269 U. S. 354, 357-358 (1926). Here, however, the quotation of the brief in the court below is obviously an admission by the appellee of the fact.

This we concede. Attack here as well as in the Supreme Court of New Jersey is upon the minimum floor area requirements of a particular ordinance, The Revised Zoning Ordinance of Wayne Township, New Jersey, adopted July 12, 1949. We have never suggested that either this Court or the Supreme Court of New Jersey should exercise jurisdiction other than to review active controversies and adverse interests capable of resolution by a judgment. Appellant corporation does not seek the review of the moot, abstract and "general" propositions which appellee erroneously suggests should have been urged. *California* v. *San Pablo & T. R. Co.*, 149 U. S. 308, 313, 314 (1893); *Aetna Life Insurance Co.* v. *Haworth*, 300 U. S. 227, 240 (1937).

> b. "The New Jersey Supreme Court merely held that the provisions in the Ordinance requiring a specified minimum dwelling floor space were permitted by the New Jersey Constitution and the enabling State statute." (p. 2)[2]

Appellee draws the conclusion that the decision below rests on adequate non-federal grounds (Statement Opposing Jurisdiction, p. 3). The underlying concept of constitutional law inherent in this proposition is so plainly at war with the established supremacy of the Federal Constitution as to make answer unnecessary.

Appellee's Statement Opposing Jurisdiction in no way impairs appellant's showing that in the state supreme court the federal question was fairly presented by the record, was necessary to determination of the cause, and that there is no adequate non-federal ground for that court's decision.

2. THE FEDERAL QUESTION PRESENTED IS SUBSTANTIAL

Under its second point, asserting that no substantial federal question is presented, appellee urges:

---

[2] Federal rights are denied as well by a failure of the state court to decide questions presented as by an erroneous decision of them. *Lawrence* v. *State Tax Comm.*, 286 U. S. 276, 282 (1932).

(1) The opinion below demonstrates the validity of the ordinance.

(2) This Court will not retry issues of fact.

(3) Five other jurisdictions have held minimum dwelling space requirements sustainable.

These contentions are considered seriatim:

(1) The Opinion of the Supreme Court Itself Raises Grave Doubt as to the Correctness of the Judgment

Although the court states that it will take judicial notice that there are minimums in housing below which construction may not go without risking the health of the occupants and the adverse affect of overcrowding in the home,[3] it apparently does not rely on these generalities. The nonreliance may result from inadequate support in the record. Appellee's witness on "emotional health" factors admitted that his conclusions were the result of elaborate and abstract calculations predicated upon numerous variables such as size of the occupant family and number and size of rooms (Record 115a and 116a). The ordinance floor space requirements are unrelated to family or room size. Moreover, there was no showing that the essential variables are applicable in Wayne Township.

The lack of substantial relation to health is also apparent on the face of the ordinance. Therein there is no single fixed requirement predicated upon considerations of health. The standard is multiple and variable: 768 square feet is

---

[3] The court's further assertion "Moreover, people who move into the country rightly expect more land, more living room indoors and out, and more freedom" is merely another way of saying that people cannot live in the suburbs unless they have more money. Insofar as it relies on "more land" and "more living room, indoors and out", it ignores the fact that this very ordinance serves to cut down the amount of outdoor living space since the ordinance contains no provisions relating size of dwelling to size of lot. It, in effect, forces the building of a larger house on a relatively small lot.

required for a one story building, 1200 feet is required for a two story building unless it has an attached garage. In the latter instance only 1000 square feet of living space is required. These arbitrary variations demonstrate that the ordinance has no substantial or rational relationship to health.

The court of necessity rested its general finding that the ordinance was within the police power upon the ground that it is necessary "to protect the character of the community", by fixing the minimum size of dwellings. This obviously resolves into nothing more nor less than assertion that the property rights of one citizen may be seriously impaired by such an ordinance for the sole purpose of enhancing the value or preventing depreciation of neighboring property belonging to another.

This ordinance is a restriction upon house construction in effect based solely upon the value of the house. It thus erects economic barriers against the entrance of respectable citizens whose only failing is their inability to pay for houses which meet the aesthetic standards of those who have preceded them.

The court below predicates its conclusion that the ordinance is related to "general welfare" and so within the police powers upon the ground that it preserves the "character of the community" and prevents the "erection of shanties which would deteriorate land values generally." This Court has never recognized that stabilization of property values is alone adequate to sustain exercise of the police power. Indeed, in *Euclid* v. *Ambler Co.*, 272 U. S. 365 (1926), it was recognized that a good guide to the validity of ordinances invading the property rights of the individual owner was the law of nuisances.

(2) In Reviewing State Court Determinations of Federal Questions This Court Is Not Debarred From Reviewing Questions of Fact

Aside from the failure of the Supreme Court of New Jersey to controvert the detailed analysis of the evidence by the trial court showing utter absence of relation of the ordinance to health, and aside from the fact that there was thus no concurrence of the two state courts on the factual aspect of the case, such as obtained in *Portland Ry. etc. Co.* v. *Oregon R. R. Commission*, 229 U. S. 397 (1913) cited by the appellee, the doctrine invoked by appellee has no application here. This Court always has the ultimate power to search the records in the state courts where a claim of constitutionality is effectively made. *Kansas City Southern Ry. Co.* v. *C. H. Albers Commission Co.*, 223 U. S. 573, 591 (1912); *Drivers Union* v. *Meadowmoor Co.*, 312 U. S. 287, 293 (1941).

The necessity for examining the circumstances in zoning cases was recognized by this Court in *Euclid* v. *Ambler Co.*, 272 U. S. 365, 387-388:

> "The line which in this field separates the legitimate from the illegitimate assumption of power is not capable of precise delimitation. It varies with circumstances and conditions. A regulatory zoning ordinance, which would be clearly valid as applied to the great cities, might be clearly invalid as applied to rural communities. * * * Thus the question whether the power exists to forbid the erection of a building of a particular kind or for a particular use, like the question whether a particular thing is a nuisance, is to be determined, not by an abstract consideration of the building or of the thing considered apart, but by considering it in connection with the circumstances and the locality."

(3) The Cases Cited by Appellee Do Not Sustain Constitutionality of Minimum Dwelling Space Ordinances

Of the state cases cited by appellee (p. 5) as sustaining minimum dwelling space ordinances, only one in fact so held. In *Thompson* v. *City of Carrollton*, 211 S. W. 2d 970 (Tex. Civ. App., 1948), the ordinance was sustained on the ground that aesthetic objectives alone are part of general welfare, for which police power may be exercised, a theory never accepted by this Court.

The other cases cited by appellee strongly support appellant's attack on the ordinance. In *Flower Hill Building Corp.* v. *Village of Flower Hill*, 199 Misc. 344, 100 N. Y. Supp. 2d 903 (Sup. Ct. 1950), the court applied the *Euclid* case rule quoted above merely ordering the case for trial to determine the "circumstances." In *Dundee Realty Co.* v. *Omaha*, 144 Neb. 448, 13 N. W. 2d 634 (1944), the opinion specifically states that the minimum building floor space requirements of the ordinance in question had earlier been repealed in keeping with that court's decision that such provision, because it sprang solely from aesthetic considerations, was not within the police power, *Baker* v. *Somerville*, 138 Neb. 466, 293 N. W. 326 (1940). In *Senefsky* v. *City of Huntington Woods*, 370 Mich. 728, 12 N. W. 2d 387 (1943), the court held the ordinance invalid.

There is slight, if any, comfort for appellee in the cases it cites. Of course, the *Flora* case[4] cited by appellee as "very similar" resembles the instant case only in that it is a zoning case. There any similarity in subject matter, constitutional challenge or facts ends.

The brief opposing jurisdiction is important only because its silence thereon in effect concedes that the federal constitutional question was adequately raised and presented in the state supreme court.

---

[4] *Flora Realty and Investment Company* v. *City of Ladue*, No. 228 O. T. 1952.

CONCLUSION

It is respectfully submitted that a substantial federal question timely raised and preserved is here presented, that this Court has jurisdiction, and that the motion of the appellee should be denied.

ALBERT L. REEVES, JR.,
WILLIAM D. DONNELLY,
HERBERT S. COLTON,
Counsel for Appellant.

CUMMINGS, STANLEY, TRUITT & CROSS,
COLTON & CAVINESS,
REUBEN P. GOLDSTEIN,
Of Counsel.